STATE OF RHODE ISLAND
PROVIDENCE, SC

SUPERIOR COURT

PATRICK C. LYNCH in his Official Capacity as the Attorney General of the STATE OF RHODE ISLAND; and DONALD L. CARCIERI, in his Official Capacity as the Governor of the STATE OF RHODE ISLAND	:	
vs.	:	C.A. No.
MATTHEW A. BROWN in his Official Capacity as the Secretary of State for the STATE OF RHODE ISLAND	:	

MEMORANDUM IN SUPPORT OF REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF

I. FACTS AND PROCEDURAL HISTORY

On June 24, 2004, the Rhode Island Senate passed S-2338, Substitute A. One day later, the House of Representatives followed, approving H-7844, Substitute A (hereafter referred to as the "Legislation"). *Exhibit 1.* Both acts, entitled "An Act Relating to Sports, Racing and Athletics – and Extension of Gambling Activities and Other Facilities," purported to authorize the establishment of a privately-operated casino in Rhode Island, and among other provisions, required that a referendum appear on the November 2, 2004 ballot, querying: "Shall there be a casino in the Town of West Warwick operated by an Affiliate of Harrah's Entertainment in association with the Narragansett Indian Tribe?"

On July 1, 2004, Governor Donald L. Carcieri vetoed the Legislation stating, among other things, that the Legislation authorizing a privately-operated casino violated R.I. Const. Art. 6, § 15, which mandates that:

> All lotteries shall be prohibited in the state except lotteries operated by the state and except those previously permitted by the general assembly prior to the adoption of this section, and all shall be subject to the prescription and regulation of the general assembly.

Subsequent to Governor Carcieri's veto, and by letter dated July 9, 2004, the Governor sought the Supreme Court's advice concerning the Legislation. In particular, the Governor propounded the following question:

> [t]he Rhode Island Supreme Court has held that a casino is a 'lottery operation and facility.' Narragansett Indian Tribe v. State, 667 A.2d 280, 282 (R.I. 1995). Article 6, Section 15 of the Rhode Island Constitution mandates that '[a]ll lotteries shall be prohibited in the state except lotteries operated by the state . . . .' H-7844, Substitute A, as amended and S-2388, [sic][1] Substitute A, as amended require a ballot question seeking to establish 'a casino in the Town of West Warwick operated by an Affiliate of Harrah's Entertainment in association with the Narragansett Indian Tribe[.]' Do the question and the legislation's establishment of a privately-operated casino violate the constitutional prohibition?

Both houses of the General Assembly have overriden Governor Carcieri's veto and thus, the Legislation is now law. On August 6, the Supreme Court heard oral arguments on the advisory opinion request from the Governor. On August 12, 2004 three Justices issued an advisory opinion that both the referendum question and the legislation as a whole are fundamentally flawed and constitutionally defective. *Exhibit 2.*

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[1] The Governor's advisory request cites S-2388, Substitute A. Senate Bill 2388, however, is entitled "An Act Relating to Public Property and Works – State Purchases. The appropriate Senate Bill is 2338.

The Advisory Opinion sets forth the harm which would ensue should this question appear on the ballot:

> ...members of the public will waste much money, time, effort, and energy to familiarize themselves with the controversial issues that the proposed casino has raised. This confusion certainly will be intensified by the fact that the Governor and the Attorney General, two general officers of this state, expressly have taken the position that the Casino Act is constitutionally infirm. The issues surrounding a statewide vote on a casino are especially important, because, as the Casino Act acknowledges, '[t]here are socio-economic costs that expanded gaming may impose on communities and the state.' R.I. Gen. Laws §41-9.1-2(7). Because we believe the question and legislation to be unconstitutional, to delay the issuance of our opinion would only postpone the inevitable. If we were to sit idly by while an unconstitutional question was submitted to the voters, only to later issue a binding decision declaring the Casino Act and the referendum question void, chaos might well ensue.

Slip Op. at 5-6.

The justices continued, stating that a determination at this time would give recognition to the "prevailing public policy in favor of finality and validity of the voting process in this state." Slip Op. p. 8.

In Holmes v. Leadbetter, 294 F.Supp. 991 (E.D. Mich. 1968) the Court issued a permanent injunction against an ordinance appearing on the ballot, saying:

> ...a vote on the referendum is an exercise in futility. ... it is unconstitutional. Even construed as nothing more than a poll, it is repugnant and offensive to our people whose constitutional rights are neither to be the subject of popular vote nor to deprivation by popular vote. The will of the electorate does not comprehend the will to curtail or amend constitutional rights, save in constitutional convention or amendment tendered for such purpose.

Id. at 996.

See also Housing and Redevelopment Auth. of Minneapolis v. City of Minneapolis, 293 Minn. 227, 198 N.W. 2d 531 (1972)(enjoining an unconstitutional question from appearing on the ballot); Hammerschmidt v. Boone County, 877 S.W.2d 98 (Mo. 1994)(en banc)(same); Fossella v. Dinkins, 485 N.E.2d 1017 (N.Y. 1985)(enjoining referendum question, given that "all the expense and human effort involved in the election process would be wasted because of fatal defects in the law"); Whitson v. Anchorage, 608 P.2d 759 (Ak. 1980)(enjoining referendum question, since "it would be useless 'to allow the voters to give their time, thought and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain because of the reasons herein set forth.'"(citation omitted)); Otey v. Common Council of City of Milwaukee, 281 F.Supp. 264 (E.D. Wisc. 1968)("it seems to be the majority view that the submission to the voters...may be enjoined when the proposed amendment, if adopted, would clearly and palpably violate a provision of the paramount Federal Constitution" and the submission of a statute to the voters may be enjoined where the statute, if adopted, would clearly contravene provisions of either the Federal or State Constitution" (citations omitted)).

In Stumpf v. Lau, 839 P.2d 120 (Nev. 1992) the Court explained in detail why it was appropriate to enjoin the submission of an initiative proposal to the voters:

> Still, we hear the cry that we should ignore all of this and let the matter go on the ballot "just to see what would happen." Those who make this idle demand should reflect upon the consequences of this court's falling away from its clear duty to interpret and enforce the law. Must those who are right, those who have come to us to tell us correctly that this proceeding is constitutionally insupportable under either the [State] or United States Constitution, be turned

> away, while we rule in favor of those who want us to let an almost admittedly ineffective initiative proceeding take its course through the elective process? We need not calculate or estimate the cost of playing such games to predict that necessarily either side of this issue will be expected to expend substantial funds on political advertising and considerable human energy in furthering one side of this issue or the other.

Id. at 126.

For the foregoing reasons, the Plaintiffs pray that the requested relief be granted.

3. Maxims Of Constitutional And Statutory Interpretation

If the Court wishes to examine the constitutional issues anew, it may do so, and will undoubtedly reach the same opinion as the Justices of our Supreme Court did on August 12, 2004. The Attorney General and the Governor fully embrace the notion that this Court's evaluation of legislative enactments should be extremely deferential. City of Pawtucket v. Sundlun, 662 A.2d 40 (R.I. 1995).

The primary focus in construing constitutional provisions is to give effect to the intent of the framers. In re Opinion of the Justices, 45 R.I. 289, 120 A. 868 (1923); State ex. rel. Webb v. Cianci, 591 A.2d 1193, 1201 (R.I. 1991); In re Advisory Opinion to the Governor (Ethics Commission) 612 A.2d 1 (R.I. 1992); City of Pawtucket v. Sundlun, 662 A.2d at 45. When words in a constitution are free from ambiguity, they should be given their plain, ordinary, and usually accepted meaning. In re Advisory Opinion (Ethics Commission) 612 A.2d at 7; City of Pawtucket v. Sundlun 662 A.2d at 45. Every clause in the constitution must be given its due force, meaning and effect, and no word or section must be assumed to have been unnecessarily used or needlessly added. Kennedy v. Cumberland Engineering Co., 471 A.2d 195, 198 (R.I. 1984) (citation omitted); In re

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Subsequent to Governor Carcieri's veto, and by letter dated July 9, 2004, the Governor sought the Supreme Court's advice concerning the Legislation. In particular, the Governor propounded the following question:

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II. STANDARD FOR ISSUANCE OF INJUNCTIVE RELIEF

The well-known requirements for issuance of injunctive relief are that a Plaintiff must show: (1) a likelihood of success on the merits; (2) irreparable harm if injunctive relief is not issued; (3) an inadequate remedy at law; and (4) harm to the public if the injunctive relief is not issued. City of Woonsocket v. Forte Bros., Inc., 642 A.2d 1158 (R.I. 1994). Plaintiffs are moving for both preliminary and permanent relief.

III. ARGUMENT

1. Plaintiffs Will Prevail on the Merits.

Rarely does a lower Court have the luxury of knowing what a reviewing court will do. In this case, three Justices of our Supreme Court, likely the same three who would hear any appeal of the instant matter, held that the Legislation is fundamentally flawed in several respects.

It is clear, then, that the only reason this matter is before this Court at the present time is a wrinkle in the available procedural mechanism. If the Supreme Court would have had the opportunity to issue a binding opinion, the dispute would be over. Since the proverbial handwriting is on the wall, this Court should look no further than the August 12 advisory opinion and grant the requested relief.

2. An Unconstitutional Referendum Appearing on the Ballot Constitutes Irreparable Harm, and Is Contrary to the Public Interest.

In situations where a state supreme court has found a ballot question unconstitutional, courts have prevented the unconstitutional question from appearing on the ballot. Here, three Justices of the Rhode Island Supreme Court have already opined that the proposed referendum is unconstitutional.

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Advisory Opinion (Ethics Commission) 612 A.2d at 7; City of Pawtucket v. Sundlun, 663 A.2d at 45. It is incumbent upon this Court to presume that the constitutional language was carefully weighed and that its terms imply a definite meaning. Bailey v. Beronian, 120 R.I. 389, 391, 394 A.2d. 1338, 1339 (1978) (citation omitted); City of Pawtucket v. Sundlun, 662 A.2d at 45; In re Advisory Opinion (Ethics Commission), 612 A.2d at 7. Even given this extremely deferential standard, the Legislation fails to pass constitutional muster.

The essential difference between a constitution and a statute is that a constitution usually states general principles or policies, and establishes a foundation of law and government, whereas a statute must provide the details of the subject of the statute. A constitution, unlike a statute, is intended not merely to meet existing conditions, but to govern future contingencies. State v. Finney, 867 P.2d 1034 (Kan. 1994).

Any attempt by the legislature to obliterate the constitution so construed by the court is unconstitutional legislation and void. Whenever the legislature enacts laws prohibited by judicially construed constitutional provisions, it is the duty of the courts to strike down such laws. Id. at 1042.

The constitution must be interpreted and given effect as the permanent law of the state, according to the spirit and intent of its framers. A legislative enactment in evasion of the terms of the constitution, as properly interpreted by the courts, and frustrating its general and clearly expressed or necessarily implied purpose, is clearly void. Id. at 1042.

In determining the meaning of a constitutional section, it is permissible that this Court consult extrinsic sources in addition to the proceedings of the constitutional convention. In re Advisory Opinion (Ethics Commission) 612 A.2d at 7, 8 (citations

omitted). Finally, when construing constitutional provisions the Court is to look at the history of the times, and examine the state of things existing (including the state of the legal landscape) when it was framed and adopted. In re Advisory Opinion (Ethics Commission) 612 A.2d at 8 (citations omitted); City of Pawtucket v. Sundlun, 662 A.2d at 45. However, in the game of constitutional interpretation, constitutional language is the ultimate "trump card." State v. Narragansett Indian Tribe, 19 F.3d 685, 699 (1st Cir. 1994). It is not the function of the court to determine whether provisions in a constitution or statute are a "good idea." Mosby v. Devine, No. 2001-161, 2004 WL 129913 (R.I. June 10, 2004)(Flanders, J., dissenting).

4. A Historical Look at "Lotteries" and the Rhode Island Constitution.

Lotteries were characterized as "Wrongs" by the government of Great Britain during the colonial period:

> By several statutes of the reign of king George II, all private lotteries by tickets, cards, or dice, (and particularly the games of faro, basset, ace of hearts, hazard, passage, rolly polly, and all other games with dice, except baggammon) are prohibited under a penalty of 200 *l.* for him that shall erect such lotteries, and 50 *l.* a time for the players. Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the denomination of sales or otherwise, which in the end are equivalent to lotteries, were before prohibited by a great variety of statutes under heavy pecuniary penalties. But particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another.

Blackstone's Commentaries on the Laws of England, Vol. 4, p. 173.

Government in Rhode Island operated under the royal charter granted in 1663 by Charles II until the State Constitution went into effect in 1843. City of Pawtucket v. Sundlun, 662 A.2d at 44 (citing William G. McLoughlin, *Rhode Island, A History*, Ch. 4 at 135 (1978)). From 1744 until the adoption of a constitution by the people of Rhode

Island in 1843, the General Assembly authorized and supervised a number of lotteries for the purpose of funding a number of public improvements. Rhode Island was in step with the rest of the fledgling republic, which was generally in favor of lotteries, even to the point of their use partially financing the Revolutionary War. Ronald J. Rychlak, Lotteries, Revenues, and Social Costs: a Historical Examination of State-Sponsored Gambling, 34 B.C.L. Rev. 11, 12 (1992). The reasoning behind the approval of lotteries was the young States' weak tax base and decentralized government. The favorable status translated into widespread popularity of lotteries. 34 B.C.L. Rev. at 13, 32. By 1860, all but three states prohibited lotteries, with a brief revival of their popularity during the Civil War and Reconstruction. Id. at 37. With the ratification of the Rhode Island Constitution of 1843, lotteries were prohibited and the use of this method of funding public improvement ended. Almond, 756 A.2d at 188. The specific constitutional language read "All lotteries shall hereafter be prohibited in this state, except those already authorized by the general assembly." 1843 Const., art. 4 sec. 12.

At the very first congregation of this State's General Assembly, a prohibition on lotteries was established by public law:

> No person shall directly or indirectly set up or put forth any lottery, *by whatever name the same may be called*:[2] if any person shall offend against the preceding provision, he shall forfeit and pay as a fine a sum not exceeding one thousand dollars, nor less than fifty dollars.

Narragansett Indian Tribe of Rhode Island v. State of Rhode Island, 667 A.2d 280, 281 (R.I. 1995), *citing* "An Act in relation to Lotteries and Lottery Tickets." P.L. 1844, sec.1.

[2] The first General Assembly, convened 160 years ago, foresaw the present dispute—no matter what the proponents attempt to name the game, if the elements are present, it is a lottery, prohibited by the law and public policy of the State.

(emphasis added).[3] Later in that enactment the General Assembly exempted from its penal provisions lottery tickets and lotteries authorized or licensed by the State. 667 A.2d at 281. In 1940, 1957 and 1961 the Rhode Island Supreme Court issued opinions defining the term "lottery" as a scheme having three elements: consideration, chance and prize. State v. Big Chief Corp., 64 R.I. 448, 13 A.2d 236 (1940); Finch v. Rhode Island Grocers Asso'n, 93 R.I. 323, 175 A.2d 177 (1961); Goodwill Advertising Company v. Elmwood Amusement Corp., 86 R.I. 6, 133 A.2d 644 (R.I. 1957).

In 1962, the House of Representatives requested an advisory opinion as to whether a lottery operated by the State for its own benefit would violate the constitution. Our Supreme Court stated unequivocally:

> The people of the state by adopting the constitution containing section 12 [the present art. 6, sec.15] expressly prohibited thereafter *all* lotteries. The language which they used is so comprehensive as to admit of no exception. This constitutional prohibition is, therefore, unquestionably the supreme law of the state and an act of the general assembly authorizing any lottery even one to be conducted exclusively by the state and for its own benefit would, in our opinion, be void.
>
> ***
>
> We cannot escape the conclusion that if [the people] had intended to make any exception to the comprehensive language which they used in section 12 [presently Art. 6, sec. 15], they would have expressly said so. Since they did not, we must assume they meant what they clearly stated that not some lotteries but *all* lotteries shall be prohibited. (emphasis in original).

Opinion to the House of Representatives, 176 A.2d 391, 392 (R.I. 1962).

In 1973, the constitution of Rhode Island was amended to lift the ban *only* on state run lotteries. Article 6, section 15 was amended to read:

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[3] The criminal prohibition against lotteries, save those operated by the State, continues today. *See*, R.I. Gen. Laws §11-19-1, et. seq. (Making it a felony to engage in unauthorized lotteries).

> All lotteries shall be prohibited in the state except lotteries operated by the state and except those previously permitted by the general assembly prior to the adoption of this section, and all shall be subject to the prescription and regulation of the general assembly.

Almond v. Rhode Island Lottery Comm'n, 756 A.2d at 186, 188 (R.I. 2000). In 1981, the Supreme Court confirmed that an unconstitutional, illegal lottery consisted of three elements-consideration, chance and prize. Roberts v. Communications Inv. Club of Woonsocket, 431 A.2d 1206 (R.I.1981).

In 1990, a statewide referendum to allow off-track betting was defeated. In 1991, the General Assembly allowed simulcast racing at Newport Grand Jai-Alai and Lincoln Park, without a public vote. In 1992, the General Assembly, again without submitting the issue to the electorate, voted to allow video lottery terminals at the Newport and Lincoln facilities. Thereafter, in 1994, the electorate approved article 6, section 22 of the Rhode Island Constitution, which requires both a statewide and local referendum prior to the expansion of the types of gambling:

> No act expanding the types of gambling which are permitted within the state or within any city or town therein or expanding the municipalities in which a particular form of gambling is authorized shall take effect until it has been approved by the majority by those electors voting in a statewide referendum and by the majority of those electors voting in a referendum in the municipality in which the proposed gambling would be allowed.
>
> The secretary of state shall certify the results of the statewide referendum and the local board of canvassers of the city or town were the gambling is to be allowed shall certify the results of the local referendum to the secretary of state.

Also on the ballot in 1994 were referendum questions to allow casino gambling in five (5) municipalities. They were all defeated. The foregoing history illustrates that the

public policy of this state is decidedly restrictive of lotteries and gambling, *not* expansive, as the proponents of the Legislation claim.

5. The Legislation establishes an unconstitutional, privately operated lottery.

i. The opinion in Narragansett Indian Tribe v. State supplied the answer to this question in 1995.

There is a constitutional prohibition on all lotteries except those operated by the state. R.I. Const. Art. 6, Sec. 15. The Court does not need to examine whether the "gambling games" enumerated in the Legislation constitute a "lottery" under Rhode Island law—that has been done. In Narragansett Indian Tribe of Rhode Island v. State, 667 A.2d 280 (R.I. 1995), the Rhode Island Supreme Court determined that a proposal to establish Class III gaming as that term is defined in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701 et seq., constituted a "lottery" under state law. In that case, a question was certified to this Court in the midst of federal litigation. At issue was a tribal-state compact that purported to permit Class III gaming under IGRA on the Narragansett Indian lands in Charlestown. Although the precise holding in that case was that the Governor had no authority to execute the compact, the Court had to determine whether a "lottery" was proposed by the compact in order to answer the question. The holding is therefore more than mere *dicta.*

Justice Bourcier wrote that the Governor lacked authority to bind the State to "the lottery compact in question." Id. at 282. The compact, as stated above, proposed Class III gaming under IGRA. Under that federal statutory scheme, there are three categories of gaming: Class I includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. 2703(6). Class II gaming

is defined as "the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)...including (if played in the same location) pull tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and ...card games that (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games. 25 U.S.C. §2703 (7)(A)(i)(III,-(ii). Class II gaming does not include "any banking card games, including baccarat, chemin de fer, or blackjack (21), or ... electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." Id. sec. 2703(7)(B).

Class III gaming includes all forms of gaming that are not Class I or Class II gaming. 25 U.S.C. 2703(8). The United States Supreme Court has decided that Class III gaming includes slot machines, casino games, banking card games, blackjack, roulette and craps. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 48 (1996). The definition of "gambling game" in the Legislation makes it clear that Class III gaming as defined by IGRA and the games listed are the same. That being the case, the binding decision in Narragansett Indian determines the outcome here—these games are "lotteries." No further examination is necessary.

ii. The legislation on its face proposes a scheme comprised of consideration, chance and prize.

If the Court wishes to examine the issue anew, it should begin with the definition of the term "lottery" as it is used in our Constitution as meaning a scheme having three

elements: chance, consideration and prize. State v. Big Chief Corp., supra; Finch v. Rhode Island Grocers Ass'n, supra; Goodwill Advertising Company v. Elmwood Amusement Corp., supra; Roberts v. Communications Inv. Club of Woonsocket, supra. These decisions are still good law today. Unless and until they are overruled, or the definition of "lottery" is altered or expanded, that definition must be employed in any inquiry concerning whether a particular scheme or enterprise constitutes an unconstitutional or illegal lottery.

A cursory examination of the definitional section of the legislation shows that the three elements predominate in the proposed operation:

- §41-9.1-3(1) provides for "winnings paid to wagerers" (prize and consideration);
- §41-9.1-3(17) provides for wagering (consideration);
- §41-9.1-3(18) provides for playing of games for "money, property, or any thing of value" (consideration);
- §41-9.1-3(20) provides for wagering (consideration) and random selection (chance).

There are more examples sprinkled throughout the Legislation, but it is clear that a "lottery", within the meaning of Supreme Court precedent, is contemplated.

Further, the definition of "lottery" was announced by the Court prior to the 1973 enactment of Art. 6, sec. 15. Had the drafters wanted to change the meaning of the term, or had they wanted to use another term, such as "gambling", "gaming", "casino", etc., they would have done so. Instead, recognizing that the term "lottery" possesses a discreet legal meaning, they chose to retain that language. Defenders of Animals, Inc. v. Dep't of Env. Mgmt., 553 A.2d 541 (R.I. 1989); First Federal Savings & Loan Ass'n of Providence v. Langton, 105 R.I. 236, 245-46, 251 A.2d 170, 176 (1969).

To accept the invitation of those who would have this Court find that somehow the term "lottery" means simply scratch tickets and numbers games would be to fall into the trap warned about as long ago as colonial times by Sir William Blackstone:

> but particular descriptions will ever be lame and deficient, unless all games of mere chance are at once prohibited; the inventions of sharpers being swifter than the punishment of the law, which only hunts them from one device to another.

Blackstone's Commentaries on the Laws of England, Vol. 4 p. 173; *See also* Opinion of the Justices, No. 277, 397 So. 2d 546, 547 (Ala. 1941); ("The courts have shown a general disposition to bring within the term 'lottery' every species of gaming, involving a disposition of prizes by lot or chance,...which comes within the mischief to be remedied--regarding always the substance and not the semblance of things, so as to prevent evasions of the law..."); 54 C.J.S. Lotteries §7 ("The name given...is immaterial. In the final analysis, the question of whether a particular transaction or series of transactions constitutes a lottery is determined by all the facts surrounding the transaction"). According to Sir William Blackstone in his *Commentaries on the Laws of England,* the term "lottery" encompassed a broad array of activities:

> [A]ll private lotteries by tickets, cards, or dice...are prohibited under a penalty...for him that shall erect such lotteries....Public lotteries, unless by authority of parliament, and all manner of ingenious devices, under the domination of sales or otherwise, which in the end are equivalent to lotteries, were...prohibited....

Blackstone's Commentaries on the Laws of England, Vol. 4, p. 173.

Many courts have determined what types of gaming are lotteries within the three element rubric otherwise known as the "American Rule", and what types of gaming are simply not lotteries. *See discussion in* Opinion of the Justices, 795 So. 2d 630 (Ala. 2001) (Under the American Rule, a scheme is a lottery if chance is the dominant factor in

determining the result of the game, even though the result may be affected to some degree by skill or knowledge.) Rhode Island, like most, if not all, jurisdictions in this country, adopted the "American Rule" in 1940, and confirmed adherence to the Rule by decisions in 1957, 1961 and 1981.

The test of the lottery is in its working rather than its wording. Boyd v. Piggly Wiggly Southern Inc., 115 Ga. App. 628, 155 S.E. 2d 630, 640 (1967). Whether a particular scheme is a prohibited lottery is determined by its character and how it is conducted, not by what it is called. Tenn. Op. Att. Gen. No. 94-127, 1994 WL 630530 (November 1, 1994). "Courts will inquire not into the name, but the game, to determine whether it is a prohibited game." Randle v. State, 42 Tex. 580 (Tex. 1974).

The popular meaning of the term "lottery" (whatever that is) cannot control in this case. Rather, binding decisions of the Rhode Island Supreme Court make it unmistakably clear what a lottery is under the constitution and laws of the State of Rhode Island.

5. The State Will Not Be "Operating" The Casino Proposed By The Legislation.

Proponents of the legislation have made (and may again make) a curious argument—that although the express language contained in the Legislation states that the casino shall be "operated" by Harrah's—that it won't *really* be operated by Harrah's, but instead will be operated by the State. The question as contained in the Legislation states: "Shall there be a casino in the Town of West Warwick ***operated by*** an Affiliate of Harrah's Entertainment in association with the Narragansett Indian Tribe?" (emphasis added). Either an Affiliate of Harrah's Entertainment is going to operate the casino, in which case it is an unconstitutional proposal--or they are not--in which case the question perpetrates a fraud on the voters, and should not be allowed. It was clearly *not* the intent

of the General Assembly to have the State operate the casino. If it were, the question would have been worded differently. Further, a provision in the Legislation makes it clear that the State will not be operating the casino:

> In the event of a suspension or revocation of a license, permit or registration, the [Lottery] Commission may take such action as is necessary to continue the daily operation of the casino until the reinstatement of the license, permit or registration in the case of a suspension, or the approval of a replacement license, permit or registration in accordance with the approval process contained in this chapter in the case of a revocation.

Sec. 41-9.1-19(k).

Clearly if the Legislation contains a contingency for the State to "take such action as is necessary to continue the daily operation of the casino until the reinstatement of the license", then the State is not operating the casino unless and until a license issued, then is suspended or revoked.

Further, to accept the argument that the regulations are so intrusive as to constitute State "operation" of the casino would be to set the stage for a claim of regulatory taking under the Fifth Amendment, forcing the State to, in effect, purchase the proposed casino. Palazzolo v. Rhode Island, 553 U.S. 606 (2001). Finally, such a finding would result in the State being held to "operate" all manner of things from schools to hospitals to insurance companies. This would be an absurd result, and should not be countenanced by this Court. Keystone Elevator Co., Inc. v. Johnson & Wales Univ., 850 A.2d 912 (R.I. 2004).

2. Neither Article 6, Section 22, Nor R.I. Gen. Laws § 41-9-4, Allow For The Voters To Approve A Privately Operated Casino Pursuant To The Legislation

Proponents of the Legislation argue that Article 6, sec. 22 of the Constitution, and R.I. Gen. Laws §41-9-1, somehow allow for a privately operated casino in Rhode Island, notwithstanding the very clear prohibition contained in Article 6, sec. 15. This argument is flawed at its very core. Neither the statute, nor sec. 22, purports to alter, amend, modify or repeal Art. 6, sec. 15. Reading the two constitutional provisions and the statute *in pari materia*[4], and presuming that the state of existing law was know and understood, the only constitutionally permissible interpretation is that in 1981 the Legislature provided for casino gambling operated *by the State*, conditioned upon approval of the required number of voters. Defenders of Animals, Inc. v. Dep't of Env. Mgmt., supra; First Federal Savings & Loan Ass'n of Providence v. Langton, supra. The more recent constitutional provision is a restriction on the power of the General Assembly to expand the types of gambling and the location where is it allowed. The History discussed infra show why-the voters did not want a repeat of the VLT scenario. It is not an alternate method of constitutional amendment.

In order to find that art. 6, sec. 22 somehow allows the voters to bypass the strict prohibition contained in art. 6, sec. 15, this Court would have to render the latter meaningless. Instead, the required inquiry is to determine whether the two provisions can be read in a manner consistent with each other. They can.

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[4] Statutes *in pari materia* should be construed together so they may be harmonized. Shelter Harbor Fire Dist.v. Vacca, 835 A.2d 446 (R.I. 2003). When interpreting the Constitution, this Court is guided by the same rules of construction that apply to the construction of statutes. In Re Advisory Opinion (Chief Justice), 507 A.2d at 1322.

Art. 6, sec. 15, as amended in 1973,[5] prohibits all lotteries save those operated by the State. Art. 6, sec. 22 allows for the voters to approve (or disapprove) legislation expanding the *types of* gambling. When read in harmony with section 22, the constitutional mandate in section 15 is clear: only the State can operate a lottery, and voter approval is necessary to change the *type* of gambling engaged in *by the State.* To hold otherwise would be to create a piecemeal voter referendum method of constitutional amendment.

The Plaintiff's position is bolstered by applying the maxim that the framers of art. 6, sections 15 and 22 are presumed to know the state of the law at the time of adoption. As discussed previously, it has long been the policy of this State to prohibit lotteries, except in narrowly described circumstances. This policy has been apparent since before the State's first Constitution, and is codified today in the present constitution, as well as the criminal and civil law. *See,* R.I. Gen. Laws §11-19-1, et. seq.

It is permissible for this Court to examine extrinsic material in determining the meaning of a constitutional provision. In re Advisory Opinion to the Governor (Ethics Commission), 612 A.2d at 8. In this case, the record of the constitutional convention of 1973 is somewhat instructive:

> First we say there should not be lotteries in the state, except now those previously permitted, and excepting those operated by the state. **I think we are all agreed that is the kind of lottery we want, no others.** (Emphasis supplied). *Exhibit 3.*

Section 22 appeared on the ballot under the heading "Restriction of Gambling", and was explained to the voters in 1994 by the Secretary of State thusly:

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[5] The prohibition was overwhelmingly passed by the voters—the final tally was 83,757 in favor of the prohibition, and 25,840 against. *Exhibit 3.*

> This proposition, if approved, would amend the State Constitution so that no legislation which would: (a) expand the types of gambling permitted within the State, (b) expand the types of gambling permitted within any city or town, or (c) authorize the expansion of a particular form of gambling authorized in certain cities and towns into additional cities and towns, can not take effect unless approved both by voters of the state at a statewide referendum and by the voters in the municipality in which the proposed gambling would be allowed.[6] *Exhibit 4.*

There is nothing in the language of art. 6, sec. 22 indicating intent to repeal, amend, or modify section 15. There is nothing in the explanation above that would permit such an interpretation. In an interview, then-Lieutenant Governor Robert Weygand stated that the purpose of section 22 was to "make it impossible for the General Assembly to approve casino gambling unless voters repeal the anticasino amendment at another referendum." *Exhibit 5.* No State action or judicial opinion since 1994 even suggests that any entity other than the State can operate a lottery or engage in casino gaming.

The State's position is further bolstered by the analysis engaged in by the Supreme Court in the Opinion to the House of Representatives, supra. In determining that under the pre-1973 constitution, no form of lotteries were permitted, the Court recognized that "Section 1 of article IV [presently section 1 of article 6] expressly provides that 'This Constitution shall be the supreme law of the state, and any law inconsistent therewith shall be void.'" Id. This Court continued, stating "It is significant that this explicit constitutional prohibition [on lotteries] was included in article IV [presently article 6]. The principal purpose of that article was to limit the power of the general assembly. ... The practical effect of article IV [presently article 6] was to deprive

[6] Portions of the voter information booklet provided by the Secretary of State to voters in the November 1994 election concerning art. 6 sec. 22 is appended hereto in the *Exhibit 4.*

the general assembly of the power to enact certain laws which it had formerly enacted without question. Among such laws were numerous enactments authorizing lotteries." Id.

It is no mistake that the admonition that the Constitution reigns as the supreme law of the land is contained in the same article as the constitutional prohibition on lotteries. This is a very clear indication that the framers -and the people- held the prohibition in high regard.

IV. CONCLUSION

For the foregoing reasons, the Attorney General and the Governor respectfully request that the Legislation be declared unconstitutional and that injunctive relief issue prohibiting the referendum question from appearing on the November 2nd ballot.

Respectfully submitted,

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CERTIFICATION

I, the undersigned, hereby certify that I hand-delivered a true copy of the within Memorandum, on this 12th day of August 2004 to those indicated below:

Matthew A. Brown, Secretary of State
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